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IN THE
COURT OF APPEALS OF INDIANA

UNDRAE MOSEBY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0610-CR-616
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Louis Rosenberg, Magistrate
Cause No. 49G99-0608-CM-152317

May 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Undrae Moseby appeals his conviction for Carrying a Handgun Without a License,[1] a class A misdemeanor. Specifically, Moseby argues that the police obtained the handgun as the result of an unreasonable pat-down search that violated the Fourth Amendment to the United States Constitution. Finding that Moseby consented to the search, we affirm the judgment of the trial court.

FACTS

On August 15, 2006, Indianapolis Police Department Officer Andre Bell was patrolling in a public housing complex in Marion County. The police department had received multiple complaints about loitering, drug dealing, and gunshots occurring in the area. Officer Bell and another officer pulled up to the complex in a marked police vehicle and exited wearing street clothing, tactical vests, and badges. Officer Bell observed four men, including seventeen-year-old Moseby, standing approximately one hundred feet away. As the officers approached, the four men began to walk away and it seemed to Officer Bell that "they tried to blend in" to the area by approaching a nearby apartment manager who was standing outside. Tr. p. 24.

Officer Bell walked up to the four men, asked to speak with them, and requested that they sit on a nearby wall. The men complied. The officers then asked for identification, which the men provided. Moseby did not have identification with him but, instead, gave the officers his name. Officer Bell asked Moseby if he could pat him down and in response, Moseby "did [not] say anything. He just stood up." Id. at 32. The officer then performed a

[1] Ind. Code § 35-47-2-1.

pat-down search on Moseby and discovered a .9-millimeter gun with nine rounds of ammunition on Moseby's right hip.

On August 16, 2006, the State charged Moseby with class A misdemeanor carrying a handgun without a license. On September 25, 2006, Moseby filed a motion to suppress the handgun because of the allegedly unconstitutional pat-down search. The trial court denied the motion prior to trial. The bench trial took place on September 25, 2006, after which the trial court found Moseby guilty as charged. The trial court imposed an executed sentence of one hundred days of imprisonment on Moseby, who now appeals his conviction.

DISCUSSION AND DECISION

Moseby argues that the trial court improperly admitted the handgun into evidence. See Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. app. 2003) (holding that a challenge to evidence following a completed trial is more appropriately framed as whether the trial court erred by admitting the evidence rather than whether it erred by denying the motion to suppress). A trial court has broad discretion in ruling on the admissibility of evidence. Barrett v. State, 837 N.E.2d 1022, 1026 (Ind. Ct. App. 2005), trans. denied. We will reverse only when the trial court has abused its discretion, which occurs when the ruling is clearly against the logic and effect of the facts and circumstances before the trial court. Id.

The Fourth Amendment to the United States Constitution protects an individual against unreasonable searches and seizures.[2] There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not:

> First, the Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. Second, pursuant to Fourth Amendment jurisprudence, the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity has or is about to occur. The third level of investigation occurs when a police officer makes a casual and brief inquiry of a citizen, which involves neither an arrest nor a stop. This is a consensual encounter in which the Fourth Amendment is not implicated.

State v. Augustine, 851 N.E.2d 1022, 1025 (Ind. Ct. App. 2006) (citations omitted).

A seizure does not occur "simply because a police officer approaches an individual and asks a few questions." Florida v. Bostick, 501 U.S. 429, 434 (1991). As long as an individual remains free to leave, the encounter is consensual and there has been no violation of the individual's Fourth Amendment rights. Augustine, 851 N.E.2d at 1026. Factors to be considered in determining whether a reasonable person would believe he was not free to leave include the threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id. The fact that most individuals will respond to a police request without being told that they are free not to

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[2] Although Moseby refers to the Indiana Constitution in his brief, he does not develop a separate and independent analysis thereunder. Consequently, he has waived this argument. See Francis v. State, 764

respond does not eliminate the consensual nature of the encounter unless the circumstances are so intimidating that a reasonable person would have believed he was not free to leave. Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 216 (1984).

Here, the record reveals that Officer Bell asked to speak with Moseby and his companions and then requested that the men sit on a nearby wall. The men complied. Moseby volunteered his name after the officer asked for identification. Officer Bell then asked if he could pat down Moseby, who did not respond verbally but stood up, signaling his assent. See State v. Jorgensen, 526 N.E.2d 1004, 1006 (Ind. Ct. App. 1988) (holding that a person may consent to a search by word or deed).

There is no evidence in the record that there was a threatening presence of several officers. Similarly, there is no evidence that the officers brandished their weapons or spoke in threatening language or tone of voice. The entire encounter took place within "a couple minutes," so there is no concern about a lengthy detention requiring probable cause. Tr. p. 25. Moseby directs us to his own testimony, which contradicts Officer Bell's version of the incident. This, however, is merely a request that we reweigh the evidence and judge the credibility of witnesses—a practice in which we do not engage when reviewing the admission of evidence. Under these circumstances, we find that the trial court properly concluded that this was a consensual encounter that did not implicate the Fourth Amendment and that the trial court did not abuse its discretion in admitting the handgun at trial.

N.E.2d 641, 646-47 (Ind. Ct. App. 2002) (holding that failure to articulate an analysis under the state constitution separate from an analysis under the federal constitution waives the state claim on appeal).

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.